

Hanging Up the Robe: A Transition to Mediation

by

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Making the transition from almost any occupation to becoming a skilled mediator can be a challenging, yet exhilarating process. The examples used in this article are based upon the move from being an experienced judge to becoming a mediator. However, for the most part, these examples can be applied, with minimal variance, to transitions from other backgrounds.

LEARNING TO BE A MEDIATOR

After thirty years on the bench, I recently made the transition to the mediation practice. The change has been a revelation. As a judge, when I tried to help people resolve their cases, there were techniques and approaches that simply were not available to me. For example, mediators can help the parties invent solutions that are in the best interest of both sides, even if the solution is not the correct legal answer. Early in my judicial career, I presided over a non-jury land use case. I rendered a verdict that I thought was a win-win resolution, but one side disagreed and appealed. The Court of Appeals reversed and remanded the case, with the directive to change my verdict to one winner and one loser, period.

Another case where my hands were tied as a Judge, involved a young boy who was hit in the head and suffered a severe brain injury. Because of the conflicting versions of what occurred, there was a significant question of liability. The amount of the defendant's offer was substantial, but much lower than it would have been had the liability been clearer. During the settlement conference I, as the judge, could not overstep my bounds to help the plaintiff's mother or their young attorney take a reality check and see that it might be acceptable to consider settling the

matter in the range of the offer. Ultimately, the case went to trial and the jury returned a no cause verdict.

To make the situation worse, because the Defendant had accepted the “Court Rule” case evaluation amount, while the plaintiff rejected it, I had to order the boy’s mother to pay the Defendant’s attorney fees, which came out of her paychecks for several years. As a mediator I certainly could have helped her consider the options more thoroughly, and may have been able to help her see the possibility that the offer was reasonable in view of the liability problems and possible sanctions. I will never forget that case. It helps me remember that in my mediator’s role, I can help people see a neutral point of view.

Despite my many years of experience on the bench, I never the less went through mediation training to help make the transition to the mediator’s role. For example, I took a forty-hour Civil Mediation course and an Alternative Dispute Resolution course, at the National Judicial College; and a forty, plus-hour Family Law Mediation Course through the, State Court Administrator’s Office [SCAO]. I joined, Professional Resolution Experts of Michigan, LLC [PREMi], through which I collaborate with other ADR practitioners; and participate in the mediation and arbitration conferences that we conduct. I also volunteer as often as possible with the Community Resolution Centers, to apply the training principles to practical experience. The combination of experience and training contributes to the mediator’s skills, including when and how to use them.

In my mediation training, I heard over and over again the statement, “you have to hang up the robe.” The statement makes sense, because a mediator’s role is definitely different. For example mediators are obviously not allowed to rule for or against either side. However, I

believe judges should be told the rest of the story, which is, do not throw the robe away; keep it figuratively hanging up close by, and conscientiously use it when appropriate. Following are some tips, based upon my having made the transition from judge to mediator.

HOLD EXPERTISE IN ABEYANCE

Holding experience in abeyance applies to any particular skill or area of expertise that a mediator brings to the table. The most effective mediators keep those assets in check until the right moment. When I mediate a case regarding damages, because of my many years of experience with settlements and jury trials, I can usually form an opinion about a reasonable resolution by merely reading the pre-meditation submissions and or hearing opening statements. However, I suppress the urge to divulge such an evaluation. Instead, I try to understand the participants' interests, and help them understand each other's points of view and interests before considering whether to reveal my perspective.

The general rule is to start the process being facilitative, enabling the disputants to reach what they perceive as a reasonable settlement. I only disclose my opinion about the terms of settlement, if and when it is absolutely necessary. One way to do this is by asking, in caucus, questions that result in a reality check. For example: "How do you think the liability issue affects the value of the case?" If requested, I may tell them out right, my opinion of the reasonable settlement value of the case.

START WITH A PLAN

To discipline ourselves to follow a consistent approach, each mediation should start with a plan, checklist or outline of how we are going to proceed. I use a two sided card, given to me by a retired judge at the National Judicial College's ADR training. Unless we agree to a different

plan, I review and use the card for each mediation. One side of the card describes “Mediator’s Guidelines,” and the other side “The Process.”

Mediator’s guidelines

1. Introduce self and Qualifications
2. Explain role of Neutral: No Legal/Financial Advice or Decision
3. Explain Mediation Process
4. Pledge Confidentiality with Statutory Exceptions
5. Settlement Not Mandatory
6. Duty of Good Faith
7. Impasse/Effect of Agreement

The Process

Steps in Mediation

1. Mediators Opening Statement
2. Parties’ Opening Statements
3. Joint Discussions
4. Caucus Jointly and Severally
5. Reconvene Joint Session
6. Closure/Agreement

However, mediation plans or guidelines are subject to interpretation. For example, Number 6 of the Mediator’s Guidelines, “Duty of Good Faith,” appears to be inconsistent with the concept that mediation is voluntary, and the parties are not obligated to participate if they choose not to. My interpretation, is that “Good Faith” during mediation is similar to “Good Faith” during a court proceeding. That is, the participants shall refrain from disrupting, or undermining the process.

However, if a person does not want to compromise their position, they are not required to make an effort to settle. Mediators Guideline 5, states “Settlement Not Mandatory.” For example, I mediated a case where custody and parenting time discussions went on for two hours.

The parties communicated their interests politely, and the mother conceded to several of the father's demands. In the final caucus the father revealed to me that he would not settle for anything less than 100%. That, of course, was his prerogative. In my mind I thought, "I wish I was the judge hearing this case. I would give him a quick lesson in reasonableness." Instead, I took a deep breath and said to him, "if she makes those concessions in her argument to the judge, who do you think the judge is likely to find more reasonable?" He responded, "I don't care." And, my report to the court merely stated that the case did not settle.

In another court ordered mediation, my co-mediator and I worked hard with the parties and attorneys for most of a day. After much give and take the parties reached a reasonable resolution. As I began to write up the terms of the agreement, the attorney for the defendant stated that he had a plane to catch and needed to get authority from the home office before we could finalize the settlement. This was alarming because the attorney led us all to believe he had actual authority.

So, as he stood up to leave, I stood up as well and said, "Before you leave, I want you to call your home office and find out whether or not you have authority to settle this case as negotiated." He went out to make the call and came back stating that the individual with the authority was not available. I then told him to, "call back and tell them that I wanted to talk to whoever was in charge of the office." He went out again, apparently made another call, and came back saying he found the person he needed to get authority from, and the settlement was approved.

I stepped out to obtain some further paper work. As I returned, my co-mediator announced loudly for the whole room to hear, "all rise," reminding me that I had temporarily re-

adorned my robe. Everyone laughed and went home happy. If the attorney would have refused to contact his office, I believe I would have been obligated to report his behavior to the Court. However, if a mediator is uncomfortable with telling the participants that they have a, “duty of good faith,” it should not be included in their plan or guidelines. It is also important to remember that mediation plans or guidelines are not written in stone. Have a plan, but be flexible in its execution.

MEDIATOR’S FLEXABILITY

One of the strongest, most powerful tools a mediator can use is “flexibility.” The type of case, the facts, the parties and attorneys are crucial in determining the flow and path of the mediation. This principle hit home for me when I attended an ICLE Advanced Negotiation and Dispute Resolution Institute [ANDRI] a couple of years ago. One of the sessions was a mediation role play. I expected the mediator to be more directive, but eventually, I realized I was missing the point. An effective mediator maneuvers the mediation much like a sailor navigates a boat. Instead of sailing directly into the wind, the sailor tacks, harnessing the power of the wind to advance in small increments. That doesn’t mean that the mediator never takes affirmative action. Sometimes sailing with the wind, and sometimes directly into the wind will be necessary. The figurative robe, or any expertise, can be helpful in utilizing this important tool of flexibility.

CONCLUSION

Our experience and training guide us in determining how and when to apply our expertise. As mediators, we can use our skills to help the parties communicate with each other, to help them understand one another and perhaps, most importantly, affirm for them that they have

been understood. Our expertise can also help us, as mediators; know when the parties need suggestive direction. But we must be careful to restrain ourselves from taking over, and controlling the party's decision making prerogatives.

If having judicial experience or any other experience could help facilitate the mediation, I believe it should be utilized carefully, without pressure, at the right time. Our objective should be to learn from each and every matter in which we participate, regardless of the outcome. This will help us grow and improve our skills, such as planning, flexibility, and how and when to utilize our background expertise.

Hang up the robe, yes, but keep it handy for use when necessary and appropriate.

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William Caprathe spent 15 years as a successful trial attorney before being elected to the Bay County Circuit Court in 1980, where he served as Chief Judge from 1984 through 1997. In 1998 he became President of the Michigan Judge's Association and later chaired the State Bar of Michigan's Judicial Conference. He is a FINRA arbitrator, Community Resolution Centers Mediator, and graduate of the National Judicial College's Dispute Resolution Skills Program. After serving 30 years on the bench, Judge Caprathe retired at the end of 2010. Since then, he continues to sit on assignment, and he conducts mediations and arbitrations. His experience involves all the types of cases that come before Michigan Courts and which includes conducting many settlement conferences and trials, both jury and non-jury. He focuses his mediation and arbitration services on torts, product liability, malpractice, contracts, securities, employment, and domestic relations disputes.